United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B
P/S

75-1288

To be argued by
MICHAEL C. EBERHARDT

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1288

UNITED STATES OF AMERICA,
Appellant,

—v.—

HERBERT YAGID,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1288

UNITED STATES OF AMERICA,

Appellant,

—v.—

HERBERT YAGID,

Defendant-Appellee.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The United States of America appeals * from an order of the United States District Court for the Southern District of New York, filed July 7, 1975, by the Honorable Charles L. Brieant, Jr., United States District Judge, dismissing Indictment 73 Cr. 471 "without prejudice" as to the defendant Herbert Yagid. Judge Brieant's dismissal was based on his finding that Yagid had not been retried in compliance with the ninety-day provision of Rule 6 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases.

Statement of Facts

Indictment 73 Cr. 471, filed May 21, 1973, charged Herbert Yagid, Salvatore Badalamente and five other defen-

* The appeal is taken pursuant to Title 18, United States Code, Section 3731.

dants in two counts with interstate transportation of forged securities (a forged bank passbook in the amount of $943,000), in violation of Title 18, United States Code, Sections 2314 and 2, and with conspiracy to commit the substantive crime, in violation of Title 18, United States Code, Section 371.

On June 21, 1973, the Government filed its notice of readiness for trial.

Trial of Yagid, Badalamente and a third defendant, Louis Stern, began before the Honorable Robert L. Carter, United States District Judge for the Southern District of New York, on March 4, 1974, and concluded on March 8, when the jury convicted Yagid and Stern on both counts and Badalamente on Count One. On April 11, 1974, Yagid was sentenced to consecutive terms of two years imprisonment and Badalamente to imprisonment for one year.

Yagid and Badalamente appealed to this Court. On November 21, 1974, this Court affirmed Badalamente's conviction but reversed Yagid's and granted him a new trial. *United States* v. *Badalamente*, 507 F.2d 12 (2d Cir. 1974). In its opinion the Court of Appeals observed that on Yagid's retrial "another district judge should preside." 507 F.2d at 15.

The mandate of the Court of Appeals issued on December 12, 1974, and was filed in the District Court on December 16, 1974. Badalamente, however, filed a petition for certiorari in the Supreme Court on January 17, 1975. 43 U.S.L.W. 3529. The petition was denied on April 15, 1975. —— U.S. ——, 95 S.Ct. 1565.

In late February and early March, 1975, prior to the passage of ninety days from the issuance of the mandate of this Court, the Government, ready to retry Yagid (A.

60),* attempted by telephone calls to the chambers of Judge Carter and to various employees of the Office of the Clerk of the District Court to ascertain when the case would be reassigned for retrial (A. 43-47, 76). Judge Carter's staff advised that "the matter would be taken care of" (A. 45). Subsequently, the Government was informed by one of the Clerk's staff that the Honorable Harold R. Tyler, United States District Judge, had been assigned Yagid's case (A. 76, 85).** This same mistaken information was apparently relayed by the Clerk to Yagid as well (A. 35-36, 57).

Further telephone calls to Judge Tyler's chambers by the Government resulted in no clarification as to the status of the case against Yagid (A. 47). However, personnel at the District Court Clerk's Office again informed the prosecutor that the case had been placed on Judge Tyler's docket (A. 47). In mid or late March, the Government learned that all of Judge Tyler's cases were in the process of being reassigned (A. 47).

In mid-April, 1975, the Government filed a Notice of Readiness in an effort to ascertain the whereabouts of the case. Approximately a week or two later the Government became aware that the notice had never been docketed (A.

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* Page references preceded by "A" refer to the Government's appendix.

** Yagid had been indicted along with several co-defendants, one of whom was Jerry Allen. Allen plead guilty and the disposition of his case had, with his consent, been reassigned to Judge Tyler from Judge Carter for the purpose of sentence since Judge Tyler had other unrelated indictments in which Allen was to be sentenced. Therefore, the docket sheet of indictment 73 Cr. 471 was apparently transferred into the recordkeeping unit in the Clerk's Office serving Judge Tyler (A. 46, 85). However, Judge Brieant noted that his records did not show the case as having been assigned to Judge Tyler at any time between the date of the mandate and the date it was assigned to him (A. 34, 45).

48). On April 30, 1975, the Government again filed a Notice of Readiness, effective on or after May 5, 1975, although such an action was not necessary (A. 48, 77). On May 23, 1975, Judge Carter, in response to the Government's second notice of readiness, sent a memorandum to the District Court Assignment Committee pointing out that this Court's suggestion that the case be reassigned for trial "[a]pparently . . . had not come to the attention of the Assignment Committee" and suggesting that the case be reassigned without delay (A. 49, 77).

Between May 23, 1975 and June 3, 1975, the Assignment Committee convened and reassigned the case to Judge Brieant. The reassignment was made a matter of record on June 4, 1975 (A. 44, 78).

Pretrial conferences before Judge Brieant were held on both June 20 and July 2, 1975 (A. 9-25, 26-71). Judge Brieant raised the issue of compliance with Rule 6 at the first pretrial conference (A. 16), heard argument on the point at the second, and reserved decision.

On July 7, 1975, Judge Brieant filed a memorandum opinion and order dismissing the indictment without prejudice to the reindictment of Yagid on the same charges (A. 72-86). Contrary to the suggestion of the Government at the July 2 conference that Judge Carter had apparently expected the District Court Assignment Committee to reassign the case, in response to this Court's opinion without action on his part (A. 51), Judge Brieant intimated that the Court of Appeals was without power to interfere in this fashion with the District Court's docket and that a request for reassignment should come formally from the Government or from the assigned Judge (A. 73-75). Judge Brieant held that the 90-day period for retrial commenced upon the filing in the District Court of this Court's mandate on December 16, 1974 (A. 76). The Court then held that despite the Government's efforts to discover whether and

to whom the case had been reassigned and to bring the case on for trial, the failure to comply with Rule 6 required that the indictment be dismissed (A. 75-80). However, the trial judge held that the delay in reassigning the case and bringing it to trial had been the result of an administrative "snafu" which the Government was at most only in part responsible for not remedying, that Yagid had not made any effort to bring the case to trial, and that, in enacting Rule 6, the District Court had not intended that "the putatively guilty would escape prosecution as a result of the type of administrative blunder or oversight which would invoke Rule 6" (A. 80-83). Accordingly, the District Court held its dismissal to be without prejudice to reindictment (A. 84).

ARGUMENT

Judge Brieant's dismissal of the indictment was not proper under Rule 6 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases.

Judge Brieant dismissed the indictment since he found that Yagid was not retried within the ninety day period of Rule 6 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases.* The Government respectfully suggests that good cause existed for the extension of the ninety day period of Rule 6 if it was indeed exceeded here and that dismissal of the indictment was not warranted on the facts of this case.

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* Rule 6 of the Southern District's Plan for Achieving Prompt Disposition of the Criminal Cases provides:

> *Retrials*
>
> Where a new trial has been ordered by the district court or a trial or new trial has been ordered by an appellate court, it shall commence at the earliest practicable time, but in any event not later than 90 days after the finality of such order *unless extended for good cause.* (emphasis added).

First of all, we respectfully submit that the 90-day period for retrial under Rule 6 had not run when the District Court dismissed the indictment on July 7, 1975. While the District Court determined that the ninety day period under Rule 6 had commenced upon the filing of this Court's mandate in the District Court on December 16, 1974,* it seems clear that the proper starting date was April 15, 1975, when this Court's order became "final" within the meaning of Rule 6 with the denial by the Supreme Court of Badalamente's petition for certiorari. *United States* v. *Roemer,* 514 F.2d 1377, 1381 & n.4 (2d Cir. 1975). In *Roemer* the District Court had dismissed the indictment of Roemer and his co-defendants for failure to comply with the Speedy Trial Rules, but this Court granted the Government's application for a writ of mandamus reinstating the indictment. *United States* v. *Lasker,* 481 F.2d 229 (2d Cir. 1973). The writ issued in September, 1973, upon denial of a motion by certain of the defendants, not including Roemer, to stay the mandate. 514 F.2d at 1379. Certain of the defendants, not including Roemer, then petitioned for certiorari, which the Supreme Court denied on March 18, 1974. 415 U.S. 975. This Court held in *Roemer* that its order in *Lasker* had not become final as to Roemer, and the 90-day period under Rule 6 had therefore not commenced, until the Supreme Court denied the petitions for certiorari filed by his co-defendants, even though the mandate of this Court had long since issued as to all defendants and even though Roemer had not petitioned for certiorari. 514 F.2d at 1381.

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* Since the trial judge was of the view that the issuance of the mandate triggered the 90-day period under Rule 6, he may perhaps have erred in selecting December 16, 1974, the date of the filing of the mandate in the District Court, rather than the date of its issuance by this Court, December 12, 1974, as commencing the 90-day period. See *United States* v. *Drummond,* 511 F.2d 1049, 1051 n. 4 (2d Cir. 1975).

We respectfully submit that *Roemer* in this aspect is controlling here and that the 90-day period for Yagid's retrial commenced on April 15, 1975, when the Supreme Court denied Badalamente's petition for certiorari, and had not ended until July 15, 1975, eight days after the indictment was dismissed below. This Court did note in *Roemer,* 514 F.2d at 1381 n.4, that Roemer ". . . plainly stood to benefit from his co-appellees' efforts . . ." to obtain review in the Supreme Court of this Court's decision in *Lasker,* and here what Badalamente sought in the Supreme Court was principally the new trial this Court had already granted his co-defendant Yagid.* However, in a "Reply and Supplemental Brief for Petitioner" filed in the Supreme Court on April 2, 1975, Badalamente also sought review of his conviction on the basis of the District Court's opinion in *United States* v. *Crispino,* 392 F. Supp. 764 (S.D.N.Y.), *rev'd.,* Dkt. No. 75-1130 (2d Cir., June 30, 1975), which, if successfully secured by Badalamente, would plainly have redounded to Yagid's benefit by dismissal of the indictment. Moreover, even without Badalamente's reliance on the District Court's opinion in *Crispino,* the absence of an interest on Yagid's part in Badalamente's petition for certiorari would hardly seem sufficient to render inapplicable here *Roemer's* holding that Supreme Court review of the judgment in *Lasker* as to some defendants stayed its finality as to all defendants for purposes of Rule 6. The judgment of this Court in *Lasker* became effective when its mandate issued, not when certiorari was denied,

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* Badalamente's petition for certiorari is reported in United States Law Week, 43 U.S.L.W. 3529, as presenting the following questions:

> "(1) Is defendant entitled to new trial on basis of finding that prosecution suppressed exculpatory evidence relating to key government witness? (2) What, in view of conflict of authority between Second Circuit and District of Columbia Circuit, is appropriate standard for determining effectiveness of counsel's assistance in criminal trials?"

and Roemer did not participate in applying for the relief his co-defendants sought and apparently did nothing to obstruct his trial upon issuance of the mandate, perhaps wisely believing that the correctness of this Court's decision in *Lasker* and the improbability that the Supreme Court would consider an interlocutory order again reviewable upon conviction rendered the efforts of his co-defendants in the Supreme Court doomed to failure, as indeed they proved to be.

Moreover, even if an absence of a derivative interest on Yagid's part in Badalamente's petition for certiorari meant that the order of this Court that Yagid be retried became final for purposes of Rule 6 when the mandate issued on December 12, 1974, we submit that the pendency of Badalamente's petition for certiorari was "good cause" within the meaning of Rule 6 to toll the running of the 90-day period for retrial until after the Supreme Court had acted. As noted, Badalamente sought a new trial in the Supreme Court, and had that relief been granted he could properly have been retried with Yagid, as he had been tried before. In *Roemer,* quite separately from its construction of finality for purposes of Rule 6, this Court noted that ". . . Judge Lasker quite appropriately chose to postpone trying the various indictments ordered reinstated by this court in *United States* v. *Lasker*, *supra*, until the Supreme Court had an opportunity to review this court's issuance of the mandamus." 514 F.2d at 1379. Similar considerations are applicable here. A retrial of Yagid alone, when Supreme Court review then actively pursued might have resulted in a retrial for Badalamente as well, would have been a serious misapplication of the scarce resources of the District Court hardly consistent with the public interest underlying the Prompt Disposition rules, *United States* v. *Roemer*, *supra*, 514 F.2d at 1381, particularly since the first trial had been lengthy and complex and Yagid was not incarcerated and had shown no interest whatso-

ever in being retried during the pendency of Badalamente's petition for certiorari.

Moreover, even if the pendency of Badalamente's petition for certiorari were of no relevance whatsoever to the applicability of Rule 6 to Yagid's retrial, it is clear that "good cause" for the delay in the retrial within the meaning of Rule 6 if ". . . construed with an awareness of the practicalities", *United States* v. *Drummond, supra,* 511 F.2d at 1053, *United States* v. *Roemer, supra,* 514 F.2d at 1381, is more than established by the record below. Not the least of these practicalities is the fact that this Court's opinion in *Drummond,* construing Rule 6 to apply to the time of trial itself rather than prosecutorial readiness for it, was filed February 11, 1975, two months after the issuance of the mandate in this case. See *United States* v. *Roemer, supra,* 514 F.2d at 1382; *United States* v. *Drummond, supra,* 511 F.2d at 1053. Second, promptly after the filing of *Drummond,* and well within 90 days after the issuance of the mandate in this case, the Government made substantial efforts to stimulate the reassignment of the case to a new trial judge, as this Court had required in its opinion, so that the case could be brought on for trial. These efforts, which the prosecutor perhaps should not have had to undertake given the provision of Rule 9 of the Southern District Plan that "[t]he court has sole responsibility for setting and calling cases for trial," were certainly more persistent and repeated than those undertaken by the prosecutors in *Roemer* and *Drummond* but were thwarted by an unfortunate and perhaps unique combination of administrative mishaps in the District Court. These included a mistaken belief on the part of Judge Carter (A. 77) that the District Court Assignment Committee would respond *sua sponte* to this Court's instruction that the case be reassigned;* the

* Judge Brieant apparently thought that this view was "ridiculous" (A. 50) and devotes a substantial portion of his opinion

[Footnote continued on following page]

failure of the Assignment Committee to act; the creation of a misleading impression that the case had been in fact reassigned to Judge Tyler because the sentencing of one defendant had, resulting in the Government's being misinformed by the District Court Clerk's Office that the case had been reassigned to Judge Tyler, a confusion further compounded by Judge Tyler's nearly simultaneous appointment as Deputy Attorney General and departure from the bench; the ineffectuality of the prosecutor's repeated telephone calls to Judge Carter's and Judge Tyler's chambers on the subject of the reassignment; the disappearance of the Government's first notice of readiness, filed in mid-April, 1975, in an attempt to discover where the case was; and the delay of a month between the successful filing, with similar purpose, of the Government's second notice of readiness on April 30, 1975, and the reassignment of the case to Judge Brieant on June 4, 1975.

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to supporting his position, earlier articulated at the July 2 conference (A. 51), that this Court's instruction that Yagid's retrial be before another District Judge was *ultra vires* and that, accordingly, the Assignment Committee had no basis upon which to act absent a request to reassign from Judge Carter. As to this we respectfully submit that Judge Brieant was plainly wrong. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129, 142-143 (1967); *United States* v. *Rosner*, 485 F.2d 1213, 1231 (2d Cir. 1973), *cert. denied*, 417 U.S. 950 (1974); *United States* v. *Clark*, 475 F.2d 240, 251 (2d Cir. 1973). Whether the Court of Appeals acts by way of direction or "suggestion" cannot be of significance, *United States* v. *Bryan*, 393 F.2d 90 (2d Cir. 1968), since the failure to follow the latter will surely bring forth the former. Compare *Nixon* v. *Richey*, 513 F.2d 427, 430 (D.C. Cir. 1975), with *Nixon* v. *Richey*, 513 F.2d 430, 435-437, 445-448 (D.C. Cir. 1975). The statute Judge Brieant relied on in support of his view, 28 U.S.C. § 137, has no bearing on the proposition for which he cited it, for an instruction, as here, that a retrial be before another judge is no interference with the powers of the District Court under Section 137 since it in no way infringes upon the District Court's power over the "[d]ivision of business among district judges".

This accretion of administrative mishaps, miniscule in their individual seriousness and with the foreseeability of their ultimate result remote, is attributable not to lack of prosecutorial diligence or even significantly to the overwork of a hard-pressed District Court in a populous urban area but rather for the most part to a unique set of improbable "snafus", as Judge Brieant called them, in the machinery of the District Court unlikely ever to be repeated in such a pernicious combination. Fully applicable here in this Court's observation in *Roemer,* 514 F.2d at 1381, in dealing with highly similar administrative errors, that "[i]t is dubious, however, that the public interest in deterring unnecessary delays in bringing cases to trial would be seriously disserved by excusing in this instance delay attributable to negligence of this sort. Some sacrifice of this deterrent interest is validated, moreover, by the concomitant vindication of the public's competing interest in the punishment and deterrence of criminal behavior," and its conclusion in *Roemer,* 514 F.2d at 1382, that "[a] number of mishaps and mistaken assumptions generated the delay beyond 90 days and provided 'good cause,' within the meaning of Rule 6, for such delay." Here the delay was little more than that involved in *Roemer* and substantially less than the one year period which passed between the date the mandate in *Drummond* should have issued and the date of Drummond's retrial, *United States* v. *Drummond, supra,* 511 F.2d at 1051, and, in contrast to *Drummond* and *Roemer,* the Government did make diligent and repeated, if unavailing, efforts to bring the case to trial promptly. Moreover, as this Court in *Drummond,* 511 F.2d at 1053-1054, and in *Roemer,* 514 F.2d at 1382, found of substantial weight in offsetting administrative negligence, the Government was ready for trial within the 90-day period after the mandate issued, and Yagid made no attempt to cause reassignment of the case or to bring it on for trial and was free on bail for the entire post-trial period. Under these circumstances Judge Brieant erred in dismissing the indictment, which charges serious crimes of which the

defendant has once been convicted, particularly in view of his stated belief, as a member of the District Court which enacted Rule 6, that its requirement that an indictment be dismissed under the circumstances of this case was neither understood nor intended by the Court which adopted it (A. 79; see also A. 83).

CONCLUSION

The order dismissing the indictment should be reversed and the case remanded for trial.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

MICHAEL C. EBERHARDT,
Special Attorney,
United States Department of Justice.

JOHN D. GORDAN, III,
Assistant United States Attorney
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN D. GORDAN, III being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of August, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

MR. HERBERT YAGID
678 Raritan Road
Cranford, New Jersey

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

John D. Gordan III

Sworn to before me this

6th day of August, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541.75
Qualified in Kings County
Commission Expires March 30, 1977

75-1288

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Tcc P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant, -against- HERBERT YAGID, Defendant Appellee	Docket No. 75-1288

ANSWER FOR APPELLEE
HERBERT YAGID

+ APPENDIX

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

HERBERT YAGID
Defendant, Pro Se
677 Raritan Road
Cranford, New Jersey 07016
(201) 272-6510

TO BE ARGUED BY

Herbert Yagid
Defendant, Pro Se

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellant -against- HERBERT YAGID, Appellee	Docket No. 75-1288

ANSWER FOR APPELLEE
HERBERT YAGID

ON APPEAL FROM AN ORDER
BY THE HONORABLE CHARLES L. BRIEANT,
JR., DISTRICT JUDGE OF THE UNITED
STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK,
FILED JULY 7, 1975

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

The United States of America appeals from an Order of the United States District Court for the Southern District of New York, filed July 7, 1975 by the Honorable Charles L. Brieant, Jr., United States District Judge, dismissing Indictment 73 Cr. 471, without said dismissal being a bar to a new indictment

as to the defendant Herbert Yagid. Judge Brieant's dismissal was based on his finding that Herbert Yagid had not been retried in compliance with the ninety-day provision of Rule 6 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases. The defendant, Herbert Yagid, originally filed a Notice of Appeal of Judge Brieant's order on July 17, 1975 and then made a motion returnable September 8, 1975 to voluntarily dismiss said appeal "without prejudice". See Defendant's Exhibits, page 1.

Statement of Facts

Indictment 73 CR 471, filed May 21, 1973, charged Herbert Yagid, Salvatore Badalamente and five other defendants in two counts, in violation of Title 18, United States Code, Sections 2314 and 2, and with conspiracy to commit the substantive crime, in violation of Title 18, United States Code, Section 371.

The Government's case rested exclusively on the testimony of one Herbert Olsberg, a paid FBI informer, who participated in the scheme and of one Jerry Allen, a co-defendant who pleaded guilty immediately prior to the trial.

The trial of Yagid, Badalamente and a third defendant, Louis Stern, began before the Honorable Robert L. Carter, United States District Judge for the Southern District of New York, on March 4, 1974 and concluded on March 8, 1974 and Yagid and Stern were convicted on both counts and Badalamente on one count (Conspiracy). On April 11, 1974, Yagid was sentenced to consecutive terms of two years imprisonment and Badalamente to imprisonment for one year.

Yagid and Badalamente appealed to this Court. On November 21, 1974, this Court affirmed Badalamente's conviction but reversed Yagid's and granted him a new trial. United States v. Badalamente, 507 F2d 12, (2d Cir. 1974). In its opinion the Court of Appeals observed that on Yagid's retrial, "Because it is possible that at the new trial the district judge who presided at the original trial may be required to testify concerning certain aspects of the suppression, we will not consider Yagid's other claims of reversible error. This is so because, on retrial another district judge should preside and he will not be bound by the rulings of the original trial judge but rather will be free to make his rulings on evidence and on instructions on the record developed before him", 507 F2d at 15. The Court went on to discuss the fact that

the Government had violated the Jencks Act, 18 U.S.C. Sec. 3500 and its continuing duty to reveal exculpatory evidence in its possession, which the government acknowledged, under Brady v. Maryland, 373 U.S. 83, 87 (1963). Unfortunately, the Court chose not to discuss, in its opinion, the subject of the trial judge's duty under the circumstances. In addition, in its opinion, 507 F2d at 17, the Court indicated "It was apparently at the instance of the district judge that the letters were forwarded to the clerk of the district court and included as part of the record in this appeal". The Court had been laboring under a misapprehension since Mr. Epstein, counsel for Yagid, had to argue over strong government objections to make the letters part of the record on appeal because said letters were placed in the file, and never noted or docketed. It was later documented that said letters were placed in the file after defendants were well into the preparation of their appeal. There never was a question as to the seriousness of the violation and the fact that reversal was mandatory with no other questions even to be considered.

The mandate of the Court of Appeals issued on December 12, 1974 and was filed in the District Court on December 16, 1974. The mandate specifically directed that Yagid's conviction was reversed and a new trial granted, and that Badalamente's conviction was affirmed.

Badalamente filed a petition for certiorari in the Supreme Court, in January 1975, after a petition for reconsideration presented to the same panel that heard the original appeal was denied without opinion. The petition for certiorari was denied on April 15, 1975 ___U.S.___, 95 S.Ct. 1565.

Subsequent to the argument of Yagid's original appeal on July 16, 1974, (CA 74-1517) and continuing therefrom until his reversal decision of November 21, 1974, and his mandate issued as a result thereof, December 12, 1974, he investigated certain matters in a cursory manner. During the running of the ninety-day period, December 13, 1974 to March 12, 1975, under Rule 6 of The Southern District Plan For Achieving Prompt Disposition of Criminal Cases, hereinafter referred to as the Plan, during which ninety days the government was supposed to bring said matter to trial again, and the ensuing forty-nine days until April 30, 1975, the date of the filing of a Notice of Readiness for Trial by the government, Yagid intensified his investigation of his own file and many other files that were directly or indirectly related cases in accordance with his own frame of reference which expanded and intensified with every significant discovery on his part. In fact, as a matter of necessity, Yagid's investigation continued as a result of the preparation of his appeal which was aborted upon application as cited in his Preliminary Statement above.

On May 28, 1975, the Honorable William H. Mulligan, Circuit Judge, granted an Order for the defendant to receive a transcript of the original appeal tape (CA 74 1517) for the purpose of making certain motions. To date, due to certain "administrative problems", the office of the Clerk of the Second Circuit Court of Appeals has been unable to comply with Yagid's request which was officially submitted July 8, 1975 and promised in ten to fourteen days at most. (see Exh. pg. 9)

On June 17, 1975, Assistant U. S. Attorney, John Lutz, called and informed Yagid that there was a pre-trial conference scheduled for June 20, 1975 and this was confirmed by written notice on June 19, 1975.

On June 20, 1975 at a pre-trial hearing before the Honorable Charles L. Brieant, Jr., which was a very short one indeed, Yagid made application for an appointed attorney under The Criminal Justice Act, the granting of co-counsel status to Yagid and Yagid indicated that he wanted to make motions to dismiss, based upon Rule 6 of the Plan and based upon the conduct of of the government in his case. Judge Brieant warned Yagid that if he was not careful he would put his own foot in his mouth,

sent him to the Magistrate's Office to get an attorney appointed for himself and adjourned the case to July 2, 1975 at 4:00 P.M. (A. 9-23)*

On July 2, 1975, after a pre-trial hearing during which the defendant, appellee, made an oral motion to dismiss under Rule 6 of the Plan, following much discussion, and wherein an attempt to make an additional motion to dismiss based upon the conduct of the government was rebuffed by the Court (A. 34-35), Judge Brieant reserved decision on said motion. (A. 67, lines 22-24 and A. 71, lines 5-8).

On July 7, 1975, Judge Brieant filed a Memorandum and Order (A. 72-86) which dismissed the indictment and stated that, "Such dismissal shall not constitute a judgment of acquittal, nor shall it be a bar to a new indictment". (A. 84)

On appeal, the government has changed its theory and approach to the subject, in emphasis, to other than as expressed at the two pre-trial hearings. Defendant mentions this only to explain the structure of the answering arguments which are

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* Page references preceded by "A" refer to the numbering of the pages of the Government's appendix.

framed to answer specific inferences injected in the government's statement of facts which could not be properly answered by restating the facts, in addition to the direct answer to its "One Point Argument".

ARGUMENT

Point I

THE CONDUCT OF THE GOVERNMENT FROM DECEMBER 13, 1974 THROUGH MARCH 12, 1975, THAT IS, THE ALLOWABLE TIME FOR RETRIAL UNDER RULE 6 OF THE PLAN AND THEREAFTER THROUGH APRIL 30, 1975, THE DAY OF THE FILING OF THE NOTICE OF READINESS, SHOULD NOT BE CHARACTERIZED AS "EXCUSABLE NEGLECT" OR AS CONDUCT ELLIGIBLE FOR THE ESC PE HATCH FOR "GOOD CAUSE".

The prosecutor herein, Michael Eberhardt made a categorical admission in his presentation at the July 2, 1975 pre-trial hearing (A. 53-54) that in mid-March, after the time under Rule 6 of the Plan had run, "The case was not ready for retrial . . ." and continues a few lines later, "Your Honor, the bottom line is simply that within 90 days Mr. Yagid was not retried." The Court then added its observation, "And that the circumstances which seem to be more or less beyond dispute here do not show that the time was extended for good cause and do not show that there was any overriding public interest in the matter which took the rule out of operation".

At (A. 43) Mr. Eberhardt indicated that he started to make calls in late February or early March, 1975. Since the ninety day Rule 6 period for retrial ended March 12, 1975, one might think, in a case where the conduct of the trial court had been inferentially questioned and the conduct of the government had been severely criticized as to withholding exculpatory information, that the prosecution might have kept a more diligent check on the progress of said matter, rather than an "alleged" phone call method of communication. Under Rule 9(a) of the Plan, the United States Attorney has the duty of keeping abreast of the course of a case. A special significance relative to Rule 9(a) and Mr. Eberhardt will be discussed later in this Answer.

At (A. 50) Judge Brieant severely criticizes the use of phone calls rather than written communications which would have accomplished action.

Mr. Eberhardt indicated that a Notice of Readiness for trial was filed and docketed on April 30, 1975 (A. 48) and then (A. 59) asks that this case be "characterized as a manufactured delay" and cites United States v. Roemer (infra) and United States v. Drummond, (infra) as authority therefor.

To this he adds an outright false assertion (A. 60) that, "Mr. Yagid in spite of our requests to obtain counsel, did not obtain counsel". and a representation that he, "was ready, able and willing to try this case," within the ninety days which is contrary to his categorical admission to the contrary (A. 53).

Point II

THE "CONFUSION" OF THE PROSECUTOR AS TO WHAT JUDGE HAD THE CASE FOR RETRIAL NEVER COULD OR SHOULD HAVE EXISTED IN AN ATMOSPHERE OF DILIGENT PROSECUTION.

At the June 20, 1975 hearing (A. 19-20) Judge Brieant informed Mr. Eberhardt as to the assignment committee's constant sessions and its speedy actions. On July 2, 1975 (A. 43-44) Judge Brieant informed Mr. Eberhardt that the ordinary practice in making such a communication, with reference to reassignment matters, would be to write a letter, make a motion or request a pre-trial conference in writing.

Special attention is requested to the dialogue between Judge Brieant and Mr. Eberhardt (A. 61-64) wherein Judge Brieant suggested that if Rule 6 of the Plan is not applied in this

case when ever would the Rule be applied and more particularly (A. 63) the Court indicated that if one written communication had been made, the situation would have been resolved by causing action which was proven by the fact that when the Notice of Readiness for trial was filed on April 30, 1975 action was initiated and the case was properly moved.

Simply stated, if Mr. Eberhardt had been diligent with relation to his duties under the Plan and more particularly with reference to Rule 9(a) thereof, he would have written a letter and speedily resolved the problem. Mr. Eberhardt should have heeded Judge Feinberg's criticism directed to him in a dissenting opinion in United States v. Cacciatore, 487 F2d 240 (2d Cir. 1973), wherein said Judge questioned whether the District Court and Circuit Council really meant what they said in the "Plan" with special emphasis given to Rule 9(a) thereof, "Responsibility of the United States Attorney and Defense Counsel." Judge Feinberg singled out the prosecutor for being remiss in neglecting to familiarize himself with the judge's scheduling procedures and causing negligent failure to prosecute. At this point, it is very hard to understand Mr. Eberhardt's unbelievable statement on June 20, 1975 to Judge Brieant (A. 22), "Your Honor, I will have to look into

the law itself with respect to retrials, . . .". Is it a sign of due diligence that two years after Judge Feinberg told him to read the Plan, he still hadn't learned what was to be done diligently with respect to retrials?

POINT III

UNITED STATES V. LASKER (INFRA), UNITED STATES V. ROEMER (INFRA), UNITED STATES V. DRUMMOND (INFRA), BADALAMENTE'S WRIT OF CERTIORARI AND HIS PARTIAL RELIANCE THEREIN ON UNITED STATES V. CRISPINO (INFRA), HAVE NO BEARING ON, RELATION TO, NOR ARE THEY ANALAGOUS TO THE MATTER HEREIN.

The government argument against dismissal by Judge Brieant is based upon two claims: (a) that for any one or combination of several contentions, the ninety day period for retrial under Rule 6 of the Plan had not run as alleged by Judge Brieant's Order, and (b) if all the aforementioned contentions did not fit the situation, that "good cause" existed for an extension of the ninety day period under the recent rulings in United States v. Roemer, 514 F2d 1377 (2d Cir. 1975) and United States v. Drummond, 511 F2d 1049 (2d Cir. 1975).

The government first contends that the Court of Appeals Order and Mandate of reversal did not become final under Rule 6 until Badalamente's petition for certiorari (Supra) was denied, relying upon United States v. Roemer, (Supra) (1381 and n. 4). The facts of United States v. Lasker, 481 F2d 229 (2d Dir. 1973), the original case, and Roemer, its derivative, are totally inconsistent with the case herein. Roemer stood by while his co-defendants went up on appeal and then claimed the running of the time in his own interest after they were denied their appeal although he stood to directly benefit if they were successful. Of course, he was not allowed to take advantage of Rule 6 of the Plan by this "sharp" practice. What the government fails to point out in the instant matter was that Yagid had already obtained his reversal and was not sitting and waiting to benefit by Badalamente's writ of certiorari. His winning or losing could not legally affect Yagid's position or toll the running of Rule 6 of the Plan. In addition (A. 6 & 7) docket entries of 12/16/74 and 1/17/75 indicate by a reading thereof respectively, that the Clerk of the Court of Appeals put on notice that final mandate of 12/12/74 was only as to Yagid and finality as to Badalamente was then completed on 1/17/75, due to a motion for reconsideration.

Of course, Badalamente then went up on a writ of certiorari, but the point being that as of 12/12/74 the lots of Yagid and Badalamente had taken their separate courses.

The government then adds that Badalamente in a supplemental addition to his request for relief added United States v. Crispino, 392 F. Supp. 764 (S.D.Y.Y. 1975) to his assertions as basis for relief and if successful, it would have redounded to Yagid's benefit. The government is attempting to take the rejection in a specific instance of "sharp" practice in Roemer and make a general rule therefrom. Yagid, once he had his relief, in no way depended upon what Badalamente did or did not do and just for the record, if Crispino ever gets by the appellate courts successfully, it will redound to the benefit of possibly a thousand people who were indicted by special prosecutors going before grand juries without authorization; but Yagid needs no such crutch. To put the onus of what Badalamente chooses to base his appeal on after Yagid already obtained his reversal could not withstand the test of logic or common sense.

The government then contends that in Roemer, Judge Lasker chose to wait for all the defendants to be tried together again, which was proper under the circumstances, and although the prosecutor herein shows due concern for the scarce resources of the

District Court in the instant matter, he doesn't show equal concern for the facts and circumstances of the matter. Yagid's defense was entrapment. Badalamente's defense was complete non-involvment. At the argument of his appeal in the Second Circuit, one of Badalamente's most forceful thrusts was a combination of incompetence and/or denial of effective assistance of counsel within which, one of the examples given amongst many others, was that Badalamente's lawyer failed to seek a severance based upon incompatibility of defenses and other reasons. (see Exhibit, page *10*). There is no question but that Badalamente, who was convicted solely upon approximately five minutes of perjured testimony by a paid FBI informer during a five day trial, would have fought as hard as he could not to go to trial with Yagid again after the first travesty on justice. In addition, there was no judge available in this case to even decide the issue as to whether Yagid's retrial should await the outcome of a Badalamente writ of certiorari and this was solely due to lack of diligence and "clean hands" on the part of the prosecutor.

Realizing that up to this point the straw thatch upon which their presentation rests could not support the roof of their contentions, the government retreats behind

their original assertions at the hearings that "calls were made" before the ninety days ran out, confusion reigned because of Judge Tyler, Judge Carter and Clerk Sexton and finds blame for everything and everyone except the prosecutor's own lack of diligence and willingness to accept the consequences of his own deeds. The prosecutor remarkably laments that he should not have had to undertake efforts in light of the Rule 9 provision of the Plan, that the Court has sole responsibility for setting and calling cases. I do believe that his short memory has caused him to forget Judge Feinberg's admonitions to him in Cacciatore (Supra) as to the remainder of Rule 9(a) and his coordinate responsibilities as a United States Attorney.

Pertaining to Drummond, that is a situation involving an unexplained delay in the issuance of a mandate, combined with the fact that "good cause" was found because of the misapprehension on the part of the prosecutor, due to the recent change, at the time being discussed in that case, from the "Rules" to the "Plan" where retrial time was reduced from 180 to 90 days.

The wording and phrasing in Drummond is noteworthy because along with, "the escape hatch of 'good cause' must

be construed with the awareneness of the practicalities," the Court also says "We stress however that we will not tolerate a delay of this sort occurring in the future . . . (Citation Omitted) . . . Both the United States Attorney and the judge to whom the retrial is assigned should closely monitor its progress". Then came what has become a standard warning to judges and prosecutors as to the upcoming stringent standards of the new Speedy Trial Act of 1974.

With reference to Roemer, Judge Lasker made a decision, with clear intent expressed, to wait for all defendants to be tried together on the facts as related to that case. A lack of communication from the Supreme Court and also the failure of the prosecutor after all of this, to comply with the ninety day Retrial Rule, further complicated the matter. The Court in 514 F2d at 1381, said, "Furthermore having been indulgent of delay stemming from similar administrative oversight in this court (citing Drummond, Supra) we are loath to create a double standard by treating district court initiated delays during the same period more severely."

The ensuing discussion in explanation thereof is so far removed from the facts of the instant case that it would be a waste of valuable time and space to copy, but it involves misapprehension in changes of rules and timing and actual trial readiness rather than, and as opposed to, statements of readiness.

The Court in 514 F2d at 1382 said, "Measures must be taken in both the offices of the courts and of the government prosecutors to flag the time requirements in all criminal cases. Failure to do so in the future will not be treated lightly. Particularly under the generally more stringent requirements of the Speedy Trial Act of 1974, 18 U.S.C. Sections 3161-3174, scheduled to take effect on July 1, 1975, negligence of the sort displayed in this case is likely to lead to the dismissal of indictments".

The government is right when it alleges that Yagid made no attempt to cause reassignment of the case, or to bring it on for trial and was free on bail for the entire post-trial period. A knowledge and understanding of Rules

7 and 9 of the Plan, Rules 1 and 21 of the Rules for the Southern District Individual Assignment System and a reading of Strunk v. United States, 412 U.S. 434 (1973) and Moore v. Arizona, 414 U.S. 25 (1973) might give a clue to Mr. Eberhardt as to the insignificance of those assertions in light of the facts of the instant case.

Since it was not the duty of Yagid to seek reassignment of the case or to bring it to trial within ninety days, he intensified and continued his investigative efforts relative to the case, spending his time uncovering documented evidence of government misconduct, in this case, from its inception (indictment) and possibly during the investigation thereof (circumstantial evidence to that effect). That is "good cause" for not worrying about retrial within ninety days and for Yagid's diligence in exposing, as he will, at a retrial or reindictment and prosecution, whichever it might be, what he has now document . and put away for safekeeping with reference to the conduct of the government and others, should he suffer his demise by "pure accident".

The real question as to the Drummond and Roemer decisions is, has the "future" arrived yet so that prosecutors, like other people, can be held accountable for diligently

carrying out their duties without relying upon the courts to do their jobs for them by the stroke of the pen. Has the "future" arrived yet, as spoken of in Drummond and Roemer, so that this kind of farce "will not be tolerated"? Does a prosecutor like Mr. Eberhardt need more warnings from the Court, as in the past, and more time than two years to learn the working of a Plan with 9 rules?

There can be no question as to why Congress felt the need for the Speedy Trial Act of 1974. Speedy Trial Act, House Report No. 93-1508, pg. 7404, indicates "The committee finds that the adoption of speedy trial legislation is necessary in order to give real meaning to that Sixth Amendment right. Thus far, neither the decisions of the Supreme Court nor the implementation of Rule 50(b) of the Federal Rules of Criminal Procedure concerning plans for achieving the prompt disposition of criminal cases, provides the courts with adquate guidance on this question". The Speedy Trial Act, 18 U.S.C., Section 3161, Time Limits and Exclusions, (h), (8), (C), provides, "No continuances under paragraph (8) (A) of this subsection shall be granted because of general congestion of the court's calendar,

or lack of diligent preparation, or failure to obtain available witnesses on the part of the attorney for the government".

Point IV

JUDGE BRIEANT WAS IN ERROR IN FINDING NO PROSECUTORIAL NEGLIGENCE OR MISCONDUCT BASED UPON WHICH HE THEN DECLARED THAT HILBERT V. DOOLING (INFRA), AND UNITED STATES V. FLORES (INFRA) DID NOT APPLY HEREIN.

In view of the two hearings of June 20, 1975 (A. 9-25) and July 2, 1975 (A. 26-71) and a reading of the full record, it is hard for this writer to understand the basis for the conclusion that there was no prosecutorial negligence or misconduct in this case (A. 83).

The first and most remarkable thing of all is that the conclusion is entirely inconsistent and contrary to Judge Brieant's own comments, as to the negligence of the prosecution, throughout the July 2, 1975 hearing.

The second point is that the Court completely disregarded an obvious and intentional misstatement of fact on the part of Mr. Eberhardt during the July 2, 1975 hearing (A. 60) as to trying to get the defendant to obtain counsel and on the same page made a false representation completely contrary to a prior admission that the case was not ready to be tried in "Mid-March" (A. 53); the significance, of course, being that March 12, 1975 was the end of the ninety day period under the Plan. Can this be denoted as anything but misconduct in the very same proceeding where Mr. Eberhardt was defending his actions as to the ninety day period? Doesn't the credibility or veracity of the prosecutor ever get tested or weighed in the Southern District of New York and the Second Circuit and taken into account in the final analysis of a case?

How does Mr. Eberhardt explain not being fully conversant with the Plan after Judge Feinberg told him to try reading it and living up to the duties and responsibilities under it as a prosecutor in United States v. Cacciatore, (Supra), two years ago? Is this not prosecutorial negligence of a most serious nature?

In Judge Brieant's reading of the first Court of Appeals decision, 507 F2d 12, (Exhibits, page 14) and the hearing of January 2, 1974, (Exhibits, page 25) didn't the judge realize that Mr. Eberhardt, at that time, was indulging in extreme prosecutorial misconduct?

Judge Brieant in his Memorandum and Order of July 7, 1975 (A. 79) indicates that a defendant rarely wants a speedy trial. At the September 12, 1973 hearing, the record indicates that the defendants were ready to go to trial as of September 19, 1973. There was an occurrence at that hearing, where defendant's attorney indicates therein that he consented to go along with an adjournment, on the representation of Mr. Eberhardt, which caused the first of a long-lasting series of documented spurious adjournments. It can now be documented that Mr. Eberhardt and others, in a concerted effort to delay the trial for certain reasons, indulged in fraud, deceit and other conduct as against the defendants, which can be classified at least as misconduct. This and a vast amount of other documented evidence will highlight future proceedings in this matter.

With a record of false statements and deceit on the part of the prosecution, defendant feels that Judge Brieant should have concluded that Mr. Eberhardt's assertions as to his efforts of diligence, as ludicrous as they were, were nothing more than a continuance of his past record of prosecutorial fraud, deceit, lies and misconduct, especially when throughout the hearings there was <u>not one bit</u> of documented evidence to back up his "stories" and "assertions of diligence".

At both the June 20, 1975 hearing (A. 24) and the July 2, 1975 hearing (A. 34-35), the defendant asserted a desire to make a motion relative to misconduct on the part of the government but was rebuffed in both instances.

For the reasons as above stated, which could be supplemented by voluminous documented evidence that I do not believe belongs in this proceeding, the defendant alleges that Judge Brieant was in error in finding no prosecutorial negligence or misconduct.

Point V

JUDGE BRIEANT'S DISMISSAL OF THE INDICTMENT AGAINST THE DEFENDANT SHOULD HAVE BEEN "WITH PREJUDICE"

In his Memorandum and Order of July 7, 1975 (A. 72-86) his Honor indicates, "But, as the Rule presently exists, the Court cannot imagine a situation more clearly in violation thereof than Yagid's case. I find that Rule 6 has not been complied with, and, accordingly, the indictment should be and it hereby is dismissed". (A. 80)

Judge Brieant then proceeded to explain why he was not going to follow the Second Circuit precedents as espoused by Hilbert v. Dooling, 476 F2d 355 (2d Cir. 1973) and United States v. Flores, 501 F2d 1356 (2d Cir. 1974) and instead rely upon United States v. Clay, 481 F2d 133 (7th Cir. 1973) and United States v. Jackson, 374 F. Supp. 168 (N.D. Ill. 1974) in dismissing the case "without prejudice" (A. 80-84).

Defendant feels that Judge Brieant misconstrued the essence of the Second Circuit rulings. The judge alludes to the "fact" that there were no Sixth Amendment rights deprivations, which, of course, the defendant does not agree with. But assuming that he was right, he continues and says that defendant made no demand for retrial.

First, there is and was no duty on the part of the defendant to have the case reassigned and put on the calendar under Rule 6 of the Plan. Rule 7, in fact, specifies the contrary, i.e., that a demand is not necessary to invoke a defendant's rights under the rules. I would rather address what I believe is a more important point. Where the situation is one of various instances of pre-first trial occurrences there might be logic in various case circumstances to argue that a defendant should have come forth and made a demand. But in a retrial case, and especially a case like this, fraught with questions involving the conduct of the prosecution and the judiciary itself, it is absolutely wrong to even start to expect this of the defendant. I cannot discuss this further at this point.

Second, there is a greater question to be resolved at a later time as to whether there was a denial of Sixth Amendment rights in this case starting from September of 1973. But, for the instant discussion, I would respectfully suggest that Judge Brieant and this Honorable court take notice of the opinion written in Moore v. Arizona, 414 U.S. 25 (1973) wherein it is stated that the old four-factors theory of deciding if the right to a speedy trial has been denied a defendant, is neither necessary or sufficient to finding a deprivation. There must also be included in such a determination, factors of prejudices caused by (1) serious

interference with defendant's liberty, whether he is free on bail or not, (2) disrupting his employment, (3) draining his resources, (4) curtailing his associations, (5) subjecting him to public obloquy, and (6) creating anxiety in him, his family, and his friends. I respectfully submit that very shortly after my indictment I was seriously subjected to every one of the six additional factors as stressed in Moore, above, and that this situation continues to this very day and will continue until the end of this travesty on justice. But, the main point is that during the ninety days of the Plan and, of course, every day thereafter until the government decided to file a notice of readiness on April 30, 1975, I was constantly subjected to these factors without any change.

Having answered what I feel Judge Brieant misconstrued, just on principle, I would like to stress that in accordance with Hilbert v. Dooling, (Supra) and United States v. Flores, (Supra) dismissal of a case pursuant to the Rules of the Plan in the Second Circuit is "with prejudice". I would also like to point out that as I read United States v. Flores, (Supra) (1360 and n. 4) the quote of the referred to note in United States v. Roemer, (Supra) (1381 [5, 6]) was taken

out of its full context and meaning as used originally in Flores.

In addition, I feel that since Drummond (Supra) and Roemer (Supra) have been fully discussed above, it would much better serve the purpose of this answer to discuss United States v. Furey, 514 F2d 1098 (2d Cir. 1975) from which I quote (at 1104), "Since it is within the court's inherent power to dismiss a prosecution without prejudice for prosecutorial delay not rising to constitutional dimensions, the district court surely may adopt a rule governing the exercise of that power. The Eastern District Plan thus constitutes no substantive change in the law. It simply regulates the exercise of the court's power over its own jurisdiction. While the Plan was partially intended to further the public interest by ending procedural delays attributable to immense court backlogs undermining public confidence in the courts . . . we see no reason why the courts cannot exercise their existing supervisory powers to remedy such a crisis of confidence. It is not at all uncommon for litigants to lose their rights irretrievably because of their failure to adhere to court created rules . . . which are designed not to protect rights of litigants but to facilitate the prompt processing of litigation . . .". In addition, (at

1105), "Moreover we find it difficult to imagine drafting an effective plan for the prompt disposition of criminal cases without the sanction of dismissal with prejudice. Such a provision is, in our view, necessary to put teeth into the scheme, see Hilbert v. Dooling, Supra. If the government prosecutor is not faced with complete and absolute discharge of the defendant upon failure to diligently prosecute, he will be less likely to live up to the spirit and letter of the Plan . . .".

The defendant respectfully suggests that by dismissing the case "without prejudice", the court, of course without specific intention, has in effect emasculated Rule 6 of the Plan and rendered it meaningless by means of judicial ruling rather than by waiting for such a change, it necessary, by promulgation of a new rule or rules.

CONCLUSION

For the above stated reasons, the appellant's appeal should be denied, and in addition said matter should be

remanded to the District Court with the instruction to amend the dismissal so as to read dismissed "with prejudice".

Respectfully submitted,

Herbert Yagid
Defendant, Pro Se
677 Raritan Road
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(201) 272-6510

EXHIBITS

Hon. A. Daniel Fusaro
Clerk
United States Court of Appeals
Second Circuit
United States Courthouse
Foley Square
New York, New York 10007

RE: United States of America
v. Herbert Yagid
CA 75-1288
Dist. Ct. 73 CR 471

Dear Sir:

Please be advised that as the Defendant, Pro Se herein, I hereby make application to this Court and pray for an order granting defendant leave as appellant to voluntarily withdraw my appeal and have same dismissed pursuant to Rule 42 of the Federal Rules of Appellate Procedure, without prejudice.

Although I have not had advice of counsel to rely upon, having proceeded herein Pro Se due to problems encountered on the part of Judge Charles L. Brieant, Jr. and the Magistrate's office in appointing an attorney for me under the C.J.A., in the District Court below, I have come to the realization, after complete and extensive case research and coverage of substantive and procedural statutes applicable thereto, that I seriously erred in Appealing Judge Charles L. Brieant, Jr.'s Memorandum and Order of July 7, 1975 dismissing the criminal counts against me and indicating that said dismissal "shall not be a bar to a new indictment."

Exh. Pg. 1

(I also served a copy of a Motion for Reconsideration of Judge Charles L. Brieant, Jr.'s Memorandum and Order upon the government and filed same with Judge Brieant for his consideration, which I shall withdraw from his Honor's consideration under separate cover with a copy of this motion enclosed. Of course, the fact that I filed both the Notice of Appeal the same day that I filed the Motion for Reconsideration removed the matter from the jurisdiction of the District Court, which I was unaware of at the time).

I submit to this Honorable Court my apology for my premature, precipitous, impulsive and reflex action which has caused a short delay in the course of the administration of justice. I submit further that this is the first delay attributable to the defendant and was completely unintentional.

I now realize that I should have waited for retrial or reindictment and prosecution which would have allowed me the full course of pretrial motions and a widened scope of the original discovery motion in light of revelations subsequent to the first trial and its reversal on appeal. There is involved documented perjury on the part of the two key government witnesses upon whom the entire government's case was based, and other documented criminal acts. In fact, I voiced a desire, pro se, to submit a motion to dismiss to Judge Brieant based upon

EXH. PG. 2

government conduct, already known to me and documented at that time, during the course of hearings on June 20, 1975 and July 2, 1975, which culminated in the Memorandum and Order of July 7, 1975. Each time, such effort was rebuffed by Judge Brieant.

In addition to the above, during my research and preparation for my appeal, I made two startling discoveries which now afford documentary proof, finally putting together a longstanding and hard to understand puzzle relative to conspiratorial, fraudulent, deceitful and other forms of misconduct on the part of government officials and others. More particularly, it involves the continuity of conduct of the government and others dating from prior to the indictment, after the indictment and continuing until the time of trial, and during and after the trial of the matter designated as 73 CR 471. More particularly, but not limited to the following, I choose to refer pointedly to the fact that I can now document and prove that the government and others, after the indictment on May 21, 1973 and continuing to the start of the trial on March 4, 1974 indulged in conduct that can be characterized, as at least in deprivation of and derogation to the Sixth Amendment Rights of the defendants to a speedy trial, prior to the first trial, and as raising very serious questions with reference to the constitutional guarantee of due process of law.

These most recent discoveries have initiated

EXH. pg. 3

new resolve on my part to expose upon retrial or reindictment and prosecution what has been able to happen in this day and age which is much more offensive to our Republic and its democratic form of government than Watergate, and its ramifications in the form of despotism and tyranny in this situation and which is only one step away from the complete perversion of something more basic than the constitutional arendments themselves, and more particularly, I refer to the separation of powers of the three branches of our government and, still more particularly, I refer to collusion between and commingling of the powers of two of the branches of government.

This case has been flooded with documented evidence of perjury of government witnesses constituting the government's entire case; subornation of perjury (circumstantial evidence); conspiracy to obstruct justice; the actual commission of the crime of obstruction of justice; aiding and abetting; accessory after the fact; concealment of records; possible intimidation of a judge; and misprision of felony.

In addition, I realize that I have severely limited myself because of the necessary limited scope of appellate

EXH. Pg. 4

review within, as presented, and have come close to wasting valuable time of this Honorable Court because this appeal, as presented, in no way represents the full scope of matters that will of absolute necessity have to come before this Court again, upon either a retrial, if that be the case, or upon reindictment and prosecution, if that be the case.

I now realize the fact, and I submit this with all due respect, that Judge Brieant's dismissal which included the words "nor shall it be a bar to a new indictment" did not make said ruling the law of the case under the cases and law of the Second Circuit and foreclose the reopening of the question upon proper motion upon reindictment and prosecution, nor did it bar my raising the question upon appeal after a retrial as long as my objection was made prior to trial.

Therefore, once again, I should have waited, and made this and other motions as outlined above, rather than waste the very valuable time of this Court and cause redundency and, in addition, take the onus for tolling the running of the statute re: Rule 5 of the "Plan for Achieving Prompt Disposition of Criminal Cases" as "defendant appellant."

EXH. Pg.5

Now that I fully realize my error due to lack of knowledge, at the time, of Federal Criminal Law and Procedure I want to purge myself immediately of this course of action and avoid any further unnecessary delay or tolling of the time for the government to reindict and prosecute either or both of the criminal counts.

In addition, the government realizing that their approach in arguments during the two pretrial hearings before the Hon. Judge Brieant was baseless and contrary to the law of the Second Circuit, changed the emphasis of their approach to the matter in their cross appeal. This I have dealt with in my answer to their cross appeal, which I have filed and served this date. In light of their new approach and grounds for appeal, I take the liberty of describing them as a shallow and last minute, last straw approach with no fiber of meritoriousness.

I hereby invite the government to also withdraw their appeal, if they so choose, and join issue and action in reindictment and prosecution to avoid any further and unnecessary redundencies and delays in the course of justice and avoid any further possible waste of the precious time of this Honorable Court which, from this time on, will be attributable solely to the government's conduct.

EXH. PG. 6

I conclude by re-emphasizing that this motion is made in good faith and sincerity and at this point, the defendant's only concern is avoidance of any further unnecessary delay in the course of justice and the wasting of the precious time of this Court.

Wherefore, the defendant appellant respectfully requests that this Honorable Court grant him leave to voluntarily withdraw his appeal and order same dismissed pursuant to Rule 42 of the Federal Rules of Appellate Procedure, without prejudice.

Respectfully Submitted

Herbert Yagid
Defendant Appellant, Pro Se and
Defendant Appellee, Pro Se
677 Raritan Road
Cranford, New Jersey 07016
(201) 272-6510

Dated: September 8, 1975
New York, New York

EXH. B, 7

HERBERT YAGID
677 Raritan Road
Cranford, New Jersey 07016

September 8, 1975

Hon. Charles L. Brieant, Jr.
District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York

RE: United States v. Herbert Yagid
Case No. 73 CR 471

Dear Sir:

Enclosed please find copy of motion to voluntarily dismiss my appeal of your Memorandum and Order of July 7, 1975 relative to the above matter.

I hereby voluntarily withdraw from your consideration the Motion for Reconsideration that I submitted to your Honor through the Pro Se Clerk on July 17, 1975.

Thank you for your courtesy and cooperation regarding this matter.

Respectfully yours,

Herbert Yagid
Defendant, Pro Se

Enclosure

EXH. Pg. 8

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 28th day of May, one thousand nine hundred and seventy-five.

Present: HON. WILLIAM H. MULLIGAN
Circuit Judge

~~Circuit Judges~~

United States of America,
Plaintiff-Appellee

v.

Jerry Allen, Salvatore Thomas Badalamente, Arthur Berardelli, James Feeney, Louis Stern, aka "Louis Rush", Leonard Turi, Herbert Yagid,
Defendants,

Salvatore Thomas Badalamente, Herbert Yagid,
Defendants-Appellants.

74-1517

Treating the letter of Herbert Yagid dated May 14, 1975 as a motion for leave to request a copy of the transcript of the tape of the proceedings at the argument of the appeal, on July 16, 1974.

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted and that a transcript of said tape shall be supplied to Herbert Yagid at his expense.

EXH. Pg. 9

William H. Mulligan
U.S. Circuit Judge